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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-68

GARY-HOBART WATER CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED STEELWORKERS OF AMERICA,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Gary-Hobart Water Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, A1-A9)[1] has not yet been officially reported, but is reported in CCH 76 Labor Cases ¶ 10,688.

1. "A" refers to the appendices to this petition. "Tr." and "Ex." refer to the portion of the record filed in the Court of Appeals.

The Supplemental Decision and Order of the National Labor Relations Board (App. C, A11-A23; 210 NLRB No. 87) has not yet been officially reported but is reported in CCH 1974 NLRB Cases ¶ 26,516.

The original Decision and Order of the National Labor Relations Board (App. D, A34-A38) and Trial Examiner's Decision (App. E, A39-A57) are reported at 200 NLRB 647.

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1975 (App. B, A10). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

1. Where the no-strike covenant of a labor agreement provides that the employees' services are "essential to the operation of a public utility and to the welfare of the public . . . and there shall be no strike, stoppages of work or any other form of interference with any of the production or other operations of the Company by the Union or its members . . .", are sympathy strikers relieved of their obligation not to engage in "stoppages of work" because the clause does not *in haec verba* identify "sympathy" strikes as falling within its ban.

2. Where such a no-strike clause at least arguably prohibits all forms of work stoppages including sympathy strikes, are such sympathy strikers under a duty to return to work upon their employer's instruction and to submit the question of the scope of the clause's prohibition to the grievance-arbitration procedure of the contract.

3. Whether such a broad no-strike clause nevertheless is limited by law to a prohibition only of strikes over matters arbitrable under the contract, thereby leaving the union and its members free to strike over all other varieties of issues, even

including those as to which the employer is under no duty to bargain.

STATUTES INVOLVED

The following provisions of the National Labor Relations Act, as amended, 29 U. S. C. 151 *et seq.*, 61 Stat. 136, Sec. 1, *et seq.*, provide in pertinent part:

> "Section 7. Employees shall have the right to self-organization, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . ."
>
> "Section 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"
>
> * * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."
>
> "Section 10(c). . . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . ."

The following provisions of the Labor Management Relations Act, 1947, 29 U. S. C. 141 *et seq.*, 61 Stat. 136, Sec. 1 *et seq.*, provide in pertinent part:

> "Section 201. That it is the policy of the United States that—
>
> * * * *
>
> "(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of

their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes;"

* * * *

"203(d). Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ."

STATEMENT

Petitioner (the "Employer"), Gary-Hobart Water Corporation, supplies water, including that for firefighting, to communities in the Gary, Indiana, area having a population of approximately 250,000 (A2, Tr. 164-165). Its employees were organized in two bargaining units, one for operating personnel, the other for clerical (A2). Under Indiana law it must endeavor to continue providing service to the public during a strike (Tr. 165).

On June 1, 1971, following the expiration of their contract, the employees in the operating bargaining unit commenced an economic strike which was to last for three months (A2). On that same day some 33 of the 34 employees in the clerical bargaining unit spread the conflict by commencing a sympathy strike (A2) despite the fact that the no-strike clause of their unexpired contract provided:

> "It is expressly understood and agreed that the services to be and being performed by the employees covered by this agreement pertain to and *are essential to the operation of a public utility and to the welfare of the public dependent thereon*, and in consideration thereof, and of the agreement and conditions herein by and between the Company and the Union to be kept and performed, the Company and the Union mutually agree that during the term of this agreement *there shall be no lockouts by the Company and there shall be no strike, stoppages of work or any other form of interference with any of the production or other operations of the Company by the Union or its members*, and any and all disputes and controversies arising under or in connection with the terms of provisions hereof shall be subject to the grievance procedure hereinafter set forth if the grievance is filed within ninety (90) days of the occurrence. . . ." (A43; emphasis added)

After the sympathy strike had lasted for 17 days, and after repeated warnings to them that their conduct violated the no-strike clause, and instructions to the sympathy strikers to return to work, the Employer discharged them (A2, 42-43). They then joined the picket line of the operating local and continued to strike (A43). At no time did the sympathy strikers make an unconditional offer to return to work (A55). Gradually the Employer hired replacements for the sympathy strikers, gave timely notice to terminate the clerical employees' labor contract, and refused to bargain with their union for a new contract as the union admitted that it represented "very few if any" of the replacements (A56, fnt. 18).

After originally dismissing Intervenor's charges the General Counsel of the National Labor Relations Board issued a complaint alleging that the Employer had violated: Section 8(a)(3) of the National Labor Relations Act by discharging and refusing to reinstate the clerical employees; Section 8(a)(5) by refusing to bargain with their Union; and Section 8(a)(1) by each of those acts (A40).

After a hearing the Trial Examiner (now "Administrative Law Judge") recommended that the complaint be dismissed in its entirety (A57). Relying on this Court's decision in *Labor Board* v. *Rockaway News Co.*, 345 U. S. 71 (1953), he concluded:

> "It is nowhere suggested how a [no-strike clause] could be drawn to cover more clearly all employee concerted activities and to forbid strikes and work stoppages . . ." (A50)

In the first appearance of this case before the Labor Board that body by a two-to-one vote dismissed the complaint but—

under the *Collyer* doctrine *(Collyer Insulated Wire,* 192 NLRB 837 (1971))—retained jurisdiction:

> ". . . for entertaining an appropriate and timely motion for further consideration upon a proper showing that (a) the dispute has not, with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted to arbitration, or (b) the grievance or arbitration procedures have reached a result which is repugnant to the Act." (A37-38)

Some months later Intervenor requested arbitration of the matter and the Employer declined on the grounds: (1) that both the Administrative Law Judge and the Review Board of the Employment Security Division of Indiana had held that the sympathy strike violated the no-strike clause and that those holdings were *res judicata;* (2) that the discharged clerical employees had been ordered to return to work well prior to their discharge and should have obeyed that order and filed a grievance at that time (in other words, that they had a duty to continue working until an arbitrator had interpreted the contract); and (3) that the demand for arbitration, coming as it did some 22 months after the clerical employees had been discharged, was untimely.

Subsequently, on Intervenor's motion, the Board issued a decision on the merits (A11-A33). By a three-to-two vote the Labor Board reversed the Administrative Law Judge, holding that the sympathy strike did not violate the no-strike clause of the contract and was thus protected under the Act.

Chairman Miller and Member Kennedy would have affirmed the dismissal of the complaint and in their dissent stated:

> "The sympathy strike of the clerical employees here was in our view in breach of the plain terms of their labor agreement and therefore constituted unprotected activity." (A32)

The Board majority ordered the Employer, *inter alia,* to reinstate the strikers with backpay from August 30, 1971 and to bargain with Intervenor (A28-30).

On the Employer's petition for review and the Board's application for enforcement the Court of Appeals enforced the Board's order *in toto* (A10). The court reasoned as follows:

First, the union's commitment that there should be *"no* strikes" or *"no* stoppages of work or any other form of interference with any of the production or other operations of the Company by the Union or its members" was not a "clear and unmistakable" waiver of the right to engage in sympathy strikes (A5). (The concurring opinion stated these words do "not specifically waive the right to engage in a sympathy strike" (A8-9).)

Second, noting that the economic strikers' dispute with the Employer was not arbitrable under the sympathy strikers' contract (A6), the opinion cites *Gateway Coal Co.* v. *Mine Workers,* 414 U. S. 368 (1974)—involving a contract not having a no-strike clause so that the obligation not to strike was implied from the arbitration provisions—for the proposition that a no-strike commitment does not extend to non-arbitrable matters (A5). The opinion concludes that the sympathy strike here did not violate the no-strike clause (A6). The court ignored the Employer's argument that the dispute between the Employer and the sympathy strikers was whether their conduct was prohibited by the contract, so that they should have followed the Employer's instructions to return to work, and protested those instructions—and warnings of termination—through the grievance-arbitration procedure.

Third, the opinion states that the no-strike clause (quoted in full at A43) "indicates an intention to treat the no-strike clause as having application co-extensively with that of the arbitration clause" (A6).

Fourth, like the Board majority, the opinion below relies on extrinsic evidence to interpret the no-strike clause (A7), giving no weight to the Administrative Law Judge's findings as to this parol evidence (See A50-52).

REASONS FOR GRANTING THE WRIT

This case presents a question of public importance on which the Labor Board divided 3-2 and the circuits are in a 3-3 conflict. The decision below also is in conflict with a prior decision of this Court:

1. The decision of the court below is squarely in conflict with this Court's decision in *Labor Board* v. *Rockaway News Co.*, 345 U. S. 71 (1953). There the Court held that the right to honor a picket line was waived by a clause providing:

> "No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto. . . ." *(Rockaway News Supply Company, Inc.*, 95 NLRB 336, fnt. 1 (1951))

The no-strike clause in this case is even broader in that it recognized that the services of the sympathy strikers were "essential to the operation of a public utility and to the welfare of the public" (A43).

During the debate over the Labor Management Reporting and Disclosure Act of 1959 the *Rockaway* decision was acknowledged and not legislatively overruled (Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, pp. 1312, 1315, 1619-1620).

2. There is conflict among the circuits as to whether the no-strike commitment extends beyond arbitrable matters. Most of those decisions involved labor injunctions and the special problems posed by the Norris-LaGuardia Act. However, the same question may arise in Labor Board proceedings (as here) and Section 301 damage actions.

As matters now stand, the Second, Fifth, and Seventh Circuits limit the prohibitions of a no-strike clause to arbitrable matters, while the Third, Fourth, and Eighth do not. (Compare *Buffalo Forge Company* v. *United Steelworkers of America*, ... F. 2d ..... (C. A. 2, 1975), BNA Daily Labor Report No. 94, pp. A13-14; *Amstar Corp.* v. *Amalgamated Meat Cutters*, 468 F. 2d 1372 (C. A. 5, 1972); and the decision in this case

(A1-9) with *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs*, 502 F. 2d 321 (C. A. 3, 1974) (en banc), *cert. den.*, 43 U. S. Law Week 3328 (Dec. 9, 1974); *Monongahela Power Co.* v. *Local 2332, I. B. E. W.*, 484 F. 2d 1209 (C. A. 4, 1973); and *Montana-Dakota Utilities Co.* v. *N. L. R. B.*, 455 F. 2d 1088 (C. A. 8, 1972).

The viewpoint of the former three circuits, as expressed in this case, is:

> "The refusal to dishonor another local union's picket line or engaging in a sympathy strike in connection with another local's strike are not disputes or controversies arising under or in connection with the first local union's agreement and are therefore neither arbitrable nor subject to the no-strike provisions." (A16.)

The contrary point of view is expressed in *Monongahela Power Co.* v. *Local 2332, I. B. E. W.*, 484 F. 2d 1209 (C. A. 4, 1973). The court stated:

> ". . . we think the dispute as to whether the refusal to cross the picket line and the resulting work stoppage violates [the no-strike clause] was clearly subject to mandatory adjustment under [the grievance-arbitration procedure].
>
> "We also note that it is immaterial to the Company's duty to arbitrate that the grievance procedure is employee oriented. The Company is bound to arbitrate if the Local elects to pursue that remedy, *and the Local is bound to arbitrate a grievance rather than resort to a work stoppage.*" (484 F. 2d 1209, 1214; emphasis added.)

In *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs*, 502 F. 2d 321 (C. A. 3, 1974) (en banc), *cert. den.* 43 U. S. Law Week 3328 (Dec. 9, 1974) the court approved a *Boys Market* injunction stating:

> ". . . Local 926 was properly enjoined from causing a work cessation. Requiring arbitration does not nullify the union's right to honor a primary picket line, but only suspends the exercise of the right until its existence is established by an arbitrator's decision." (p. 324)

The conflict over this issue is so acute that two district courts reached opposite results on essentially the same facts in cases

involving the same employer within a one-week period. Compare: *Pilot Freight Carriers* v. *International Brotherhood of Teamsters*, 86 L. R. R. M. 2419 (N. D. Ga., 1974) (injunction granted) *with Pilot Freight Carriers, Inc.* v. *Local 560, International Brotherhood of Teamsters*, 373 F. Supp. 19 (D. C. N. J., 1974) (injunction denied).

This conflict between the circuits may only be resolved by this Court.

3. The matter is of importance to the public, employees and employers. The Bureau of National Affairs estimates that 91 percent of all labor agreements contain no-strike clauses falling into two general categories:

> "1) unconditional bans on interference with production during the life of the contract; and 2) conditional bans, which permit strikes under specified conditions. The no-strike ban most commonly is lifted after exhaustion of the grievance procedure, in disputes over issues outside the grievance procedure, or 'when an impasse is reached in reopener talks.'
>
> "The percentage of unconditional bans has remained stable at 57 percent since the last basic patterns survey . . ."
>
> * * * *
>
> "Unconditional pledges predominate in eighteen industries, appearing in . . . 90% of utilities agreements." (Bureau of National Affairs, "Collective Bargaining Negotiations and Contracts" Service, Vol. 2, pp. 77:1-2.)

The same source also estimates that some 20 percent of the labor contracts "state that employees may observe picket lines in specified situations" (*Id.* at p. 77:5).

Plainly unions and employers have reached accommodations on these matters within the teachings of the *Rockaway* decision (345 U. S. 71). The expectations of the public and the majority of employers, whose no-strike clauses are unconditional, should not now be frustrated by a new doctrine under which, as the Labor Board minority put it, the broad term "no-strike" nevertheless is "limited [by court doctrine] to specific kinds of strikes" (A32).

4. The decision below is in conflict with Section 203(d) of the Labor Management Relations Act, 29 U. S. C. § 173(d), and the decisions of this Court implementing it. In part it states:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

The history of this Court's implementation of that provision may be found in *Boys Markets* v. *Clerks Union*, 398 U. S. 235 (1970) and *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368 (1974). These are also the decisions on which the circuits rely in reaching their conflicting results.

Thus the fundamental underpinning of the decision in this case was this quotation from *Gateway:*

> ". . . Absent an explicit expression of such [other] intention . . . the agreement to arbitrate and the duty not to strike should be construed as having co-terminus application." (A5; 414 U. S. 368, 382.)

With this single sentence as its major premise, the court concluded:

> "The refusal to dishonor another local union's picket line or engaging in a sympathy strike in connection with another local's strike are not disputes or controversies arising under or in connection with the first local union's agreement and are therefore neither arbitrable nor subject to the no-strike provisions." (A6)

However, the court below ignored that in the same paragraph of the opinion in *Gateway* the Court stated:

> "Thus an arbitration agreement is usually linked with a concurrent no-strike obligation, *but the two issues remain analytically distinct*. Ultimately, each depends on the intent of the contracting parties. It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation." (414 U. S. 368, 382; emphasis added.)

This language also makes it clear that the parties are free to combine a broad no-strike clause with a restricted arbitration provision. That is the situation in this case and typically in industry: the no-strike clause states that there are to be "no strikes, stoppages of work" etc.; but the grievance-arbitration procedure is limited to "disputes and controversies arising under or in connection with the "terms or provisions hereof . . ." (A5). One of the reasons why this is typically the case is that the employer's duty to bargain is limited to "wages, hours, and other terms and conditions of employment" (Sec. 8(d)) and employers ordinarily are unwilling to permit an arbitrator to rule on matters as to which they have no duty to bargain or on matters outside the contract.

The court below simply gave no effect to this Court's repeatedly expressed policy of encouraging "the peaceful resolution of industrial disputes," *Boys Markets* v. *Clerks Union*, 398 U. S. 235 (1970) at p. 251; *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368 (1974) at p. 381. As was pointed out in a slightly different context:

> "[Section 7 rights] are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife . . ." *(Emporium Capwell Co.* v. *Western Addition Community Organization*, ... U. S. ....., ... (1975); 43 Law Week 4214, 4218.)

It is clear that the court below gave no heed to that policy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 74-1483

GARY HOBART WATER CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED STEELWORKERS OF AMERICA,
Intervenor.

Petition for Review and Cross-Application for Enforcement of Order of the National Labor Relations Board

Argued January 13, 1975—Decided February 21, 1975

Before CLARK, *Associate Justice,** FAIRCHILD, *Chief Judge* and SPRECHER, *Circuit Judge.*

SPRECHER, *Circuit Judge.* The question on this review and cross-application for enforcement of a Board order is whether under the collective bargaining agreement involved, employees were engaged in protected activities when honoring another local union's picket line and participating in a sympathy strike.

* Assiciate Justice Tom C. Clark of the Supreme Court of th United States (Retired) is sitting by designation.

I

The Company supplies water on a wholesale basis to residential and industrial customers in Gary and Hobart, Indiana, and surrounding areas. At the time of the alleged unfair labor practices two locals of International Union of District 50, Allied and Technical Workers of the United States, represented the Company's employees. Local 13584 represented a unit consisting of operating or production and maintenance employees, sometimes referred to as the "men's unit," and had a bargaining relationship with the Company since 1952.

On September 5, 1968, the Board certified Local 14321 as the representative of a unit consisting of clerical employees, sometimes known as the "women's unit." Commencing on March 21, 1969, the women's unit struck the Company. During the strike, 70 of the 97 members of the men's unit honored the women's picket line. On April 1, 1969, the Company entered into a bargaining agreement with the women's unit for the period up to December 31, 1971.

On June 1, 1971, following expiration of the men's contract, the Local 13584 unit began an economic strike. Thirty-three of the 34 members of the women's unit honored the picket line. After warnings, the Company on June 17 discharged each of the women who honored the men's line. The discharged employees were replaced very slowly, one being replaced by June 17 and only 6 by August 17. At no time during the strike or through the summer of 1971 was there any disruption of service to the Company's customers.

On August 18, their Union on their behalf sent a telegram to the Company offering that the women return to work immediately, which offer was rejected by the Company. On August 30, the men's unit returned to work.

On October 27, the Company notified the Union that it was terminating the women's contract, believing that "the contract

has already been terminated by operation of law." Prior to and after the contract expired by its terms on December 31, 1971, the Company refused to bargain with the Union in regard to the women's unit.

As a result of charges filed on behalf of the women's unit on June 21 and November 12, 1971, a complaint issued on January 4, 1972, alleging that the Company violated section 8(a)(3) of the National Labor Relations Act, 29 U. S. C. § 158(a)(3), by discharging 34 employees on June 17, 1971, because they engaged in a protected sympathy strike, and by refusing to reinstate them when openings occurred although they made an unconditional offer to return to work on August 18, 1971; violated section 8(a)(5), 29 U. S. C. § 158(a)(5), of the Act by terminating its collective bargaining agreement with the Union on October 27, 1971, and by refusing to bargain with the Union; and violated section 8(a)(1), 29 U. S. C. § 158(a)(1), of the Act by each of the foregoing acts.

On June 16, 1972, the Administrative Law Judge recommended that the complaint be dismissed. On November 30, 1972, the Board ordered that the complaint be dismissed but that jurisdiction be retained for further consideration if the dispute be not resolved with reasonable promptness either by amicable settlement in the grievance procedure or by arbitration. When the Company refused to follow the grievance procedure or to arbitrate, the Union moved for further consideration.

On May 21, 1974, the Board decided the matter on its merits. 210 N. L. R. B. No. 87 (1974).

The Board found that the contract's no-strike provisions did not waive the women's unit statutory right to observe the picket line of their brother union; that the discharge of the clericals on June 17, 1971, for such activity therefore violated sections 8(a)(1) and (3) of the Act; and that, since the unlawfully discharged clericals remained employees within the meaning of the Act, the Union's majority status continued and the Com-

pany's subsequent refusal to bargain with it violated section 8(a)(5) of the Act.

The Board's order directed the Company to cease and desist from the unfair labor practices found or in any other manner interfering with, restraining, and coercing its employees in the exercise of their section 7 rights. Affirmatively, the Board's order required the Company to offer to the discharged clericals immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights; and to make them whole for any loss of earnings they may have suffered by reason of the Company's discrimination against them. The Board's order further required the Company, upon request, to meet and bargain with the Union with respect to wages, hours, and other conditions of employment and embody in a signed agreement any understanding reached, and to post appropriate notices.

II

The ordinary status of a sympathy striker was well set forth in *NLRB* v. *Southern Greyhound Lines, Inc.*, 426 F.2d 1299, 1301 (5th Cir. 1970):

> Initially, we think it obvious that when an employee, as a matter of principle, refuses to cross a picket line at his own employer's place of business, the employee, even though he is not a member of the striking union, has in effect plighted his troth with the strikers, joined in their common cause, and has thus become a striker himself. . . . The basis of the protection against discharge afforded an employee who refuses to cross a picket line at his employer's business is his status as a striker. Such an employee is therefore entitled to all the protections due under the National Labor Relations Act to those strikers with whom he has joined cause. Conversely, the employer's right to discipline such an employee to preserve the operation of his business is limited to those measures which he could lawfully use against strikers.

The right to strike guaranteed by section 7 of the Act, 29 U. S. C. § 157, may be surrendered or waived by appropriate provisions in the collective bargaining agreement. *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 280 (1956).

Correlatively, the right to engage in a sympathy strike or the right to refuse to cross a picket line may be waived in the same manner. *NLRB* v. *Rockaway News Supply Co.*, 345 U. S. 71, 80 (1953).

In this circuit we hold that "[i]n order to effectuate the relinquishment of a collective bargaining right under the provisions of a collective bargaining agreement, . . . the preferable rule requires that waiver be in 'clear and unmistakable language.' " *NLRB* v. *Wisconsin Aluminum Foundry Co.*, 440 F. 2d 393, 399 (7th Cir. 1971).

"[A] no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration." *Boys Markets, Inc.* v. *Retail Clerks Local* 770, 398 U. S. 235, 248 (1970).

"Absent an explicit expression of such [other] intention . . . the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U. S. 368, 382 (1974).

Here the no-strike-arbitration clauses read as follows:

> [The parties agree that] there shall be no lockouts by the Company and there shall be no strike, stoppages of work or any other form of interference with any of the production or other operations of the Company by the Union or its members, and any and all disputes and controversies arising under or in connection with the terms of provisions hereof shall be subject to the grievance procedure . . . [followed by a three-step grievance procedure resulting in binding arbitration under the third step]. (Article V).

• • •

> The Union agrees that there shall be no strikes, slowdowns or other interruption of work by any of its members during the term of this agreement, and the Company agrees that there shall be no lockout during the term of this agreement, and both parties agree that any disputes or differences shall be taken up under the Grievance and Arbitration procedures of this agreement. (Article XVIII, para. (2)).

This language indicates an intention to treat the no-strike clause as having application coextensively with that of the arbitration clause. That application is to "any and all disputes and controversies arising under or in connection with the terms of provisions" of the bargaining agreement.

The refusal to dishonor another local union's picket line or engaging in a sympathy strike in connection with another local's strike are not disputes or controversies arising under or in connection with the first local union's agreement and are therefore neither arbitrable nor subject to the no-strike provisions.

In *Inland Steel Co.* v. *Local 1545, United Mine Workers of America,* 505 F. 2d 293 (7th Cir. 1974), we held that the district court could enjoin a sympathy strike or the honoring of a stranger union's picket line where the scope of arbitrable disputes had been fixed by the parties to the collective bargaining agreement, as follows:

> [D]ifferences . . . [1] as to the meaning and application of the provisions of this agreement, or [2] should differences arise about matters not specifically mentioned in this agreement, or [3] should any local trouble of any kind arise at the mine . . . .

Id. at 297 n.5.

The court said of this agreement:

> It is our conclusion that "the any local trouble of any kind aris[ing] at the mine" language contained in this exceptionally broad arbitration clause is itself expansive enough to cover the present disputes. A work stoppage which results from the honoring of stranger picket lines by company employees is certainly local trouble at the mine. Any other construction of this language would simply be ignoring the realities of the situation. Moreover, these parties agreed to arbitrate not only disputes concerning the meaning and application of the express provisions of the agreement but also disputes "about matters not specifically mentioned in this agreement." By the use of this terminology, we conclude that the parties mutually contracted to resolve any labor difficulties arising during the life of the agreement by the arbitration process, other than disputes which are "national in character."

Id. at 298.

The court relied upon clauses [2] and [3], *supra,* and in the present case the parties adopted nothing more than clause [1]. Clause [1] seems to us clearly not to affect the right to engage in a sympathy strike. In any event it is not clear and unmistakable language waiving that right.

Under these circumstances, the bargaining history between the Company and Union need not be examined in order to interpret the language of the collective bargaining agreement. *Montana-Dakota Utilities Co.* v. *NLRB,* 455 F. 2d 1088, 1092 (8th Cir. 1972). But here, if we carry our consideration into that history, our conclusion is only reinforced. At the very time that the Local 14321 agreement was being negotiated, the women's unit was on strike and the men's unit was engaged in a sympathy strike, refusing to cross the women's picket line. Yet no specific language dealing with sympathy strikes was included in the women's unit agreement.

During the men's unit strike precipitating the women's discharges involved here, the Company submitted to the Union specific language covering sympathy strikes but the Union rejected that language. In other words the Company knew how to deal specifically with the subject when it so desired.

Even if we should assume, moreover, that the no-strike-arbitration clause of the Gary Hobart agreement was broad enough to make sympathy strikes and the honoring of a stranger local union's picket lines arbitrable, we would nevertheless be bound to enforce the Board's order inasmuch as it was entered only after the Board had on November 30, 1972 first found that

> [S]ince the resolution of the threshold issue (whether the no-strike clause of the grievance procedure of the collective-bargaining agreement protected the sympathy strike of the clerical unit) turns on the meaning and application of the no-strike clause, and the alleged unfair labor practices are so intimately intertwined with the interpretation of the contract, it would best effectuate the policies of the Act to defer to arbitration.

210 N.L.R.B. No. 87 at 1 (1974).

The Board retained jurisdiction and proceeded to determine the case on the merits after the Company refused to resolve the issues in dispute by settlement under the grievance procedure or by submission to arbitration. The Board found that the discharged employees had been engaged in protected activity and were entitled to relief.

We conclude that neither the employees nor their Union waived their right to engage in a sympathy strike. *Kellogg Co.* v. *NLRB*, 457 F. 2d 519 (6th Cir.), *cert. denied*, 409 U. S. 850 (1972).

The Board's findings and conclusions are supported by substantial evidence on the record considered as a whole.

Petition for Review Denied and Order Enforced.

FAIRCHILD, *Chief Judge, concurring.* I agree that, absent an unequivocal waiver by the union, the Company's discharge of the Local 14321 employees for engaging in the concededly protected activity of observing another union's picket line, was violative of § 8(a)(3) of the National Labor Relations Act.

The "no strike" commitment present in the instant collective bargaining agreement does not specifically waive the right to

engage in a sympathy strike. Accordingly, the Company is essentially arguing for the implication of such a term into the agreement's general proscription. Such protected rights should not be deemed waived by implication of law unless it is clear that the parties actually intended such a result.

I do not find *Inland Steel Co.* v. *Local 911, United Mine Workers of America*, 505 F. 2d 293 (7th Cir. 1974) controlling in the present case. As the court makes clear, the implication of a no-sympathy-strike agreement in *Inland* was founded upon an "exceptionally broad" and all-inclusive arbitration agreement. In the Gary-Hobart contract, the express no strike commitment does not specifically include a promise not to honor the picket line and the arbitration provisions are of narrower scope and application than those in *Inland*. I agree that the Board's order should be enforced.

APPENDIX B

JUDGMENT

Before: CLARK, *Associate Justice,** FAIRCHILD, *Chief Judge* and SPRECHER, *Circuit Judge.*

This Cause came on to be heard upon the petition of the Gary Hobart Water Corporation, to review a supplemental order of the National Labor Relations Board issued against Petitioner, its officers, agents, successors and assigns on May 21, 1974, and upon the application of the National Labor Relations Board to enforce said supplemental order. The Court heard argument of respective counsel on January 13, 1975, and has considered the briefs and transcript of record filed in this cause. On February 21, 1975, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order.

On Consideration Whereof, it is hereby ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Gary Hobart Water Corporation, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

It Is Further Ordered and Adjudged by the Court that costs shall be taxed against the Petitioner.

/s/ THOMAS E. FAIRCHILD
Judge, United States Court of Appeals for the Seventh Circuit
/s/ ROBERT K. SPRECHER
Judge, United States Court of Appeals for the Seventh Circuit
/s/ TOM C. CLARK
Associate Justice of the Supreme Court of the United States

* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

Approved as to form. Fred H. Daugherty.

APPENDIX C

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL DECISION AND ORDER

On June 16, 1972, Administrative Law Judge Lloyd Buchanan issued the attached Decision in this proceeding in which he recommended the complaint be dismissed in its entirety. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs and the Respondent filed an answering brief.

On November 30, 1972, the Board[1] found that, since the resolution of the threshold issue (whether the no-strike clause of the grievance procedure of the collective-bargaining agreement protected the sympathy strike of the clerical unit) turns on the meaning and application of the no-strike clause, and the alleged unfair labor practices are so intimately intertwined with the interpretation of the contract, it would best effectuate the policies of the Act to defer to arbitration. The Board, however, retained jurisdiction for entertaining "an appropriate and timely motion for further consideration upon a proper showing that (a) the dispute has not, with reasonable promptness after issuance of this decision, either been resolved by amicable settlement in the grievance procedure, or submitted to arbitration. . . ."

Thereafter, the Charging Party filed a motion for further consideration, alleging Respondent has refused to resolve the issues in dispute by settlement under the grievance procedure or by submission to arbitration, and requested that the Board decide the case on the merits. On June 25, 1973, the Board

1. *Gary-Hobart Water Corporation,* 200 NLRB No. 98, Member Fanning dissenting.

issued a Notice To Show Cause why it should not proceed to consider the case on the merits. Thereafter, the Respondent filed a response to the Board's Notice To Show Cause, and the Charging Party filed a reply to Respondent's response.

The Board has considered the record, the Administrative Law Judge's Decision, the exceptions and briefs, the motion for further consideration, the Respondent's response to the Board's Notice To Show Cause, and the Charging Party's reply, and finds as follows:

1. On deferral

In view of the Respondent's refusal to go to arbitration to resolve the issues in dispute, the Board unanimously finds this case should be decided on the merits.[2] In its response to the Board's Notice To Show Cause, the Respondent, in essence, contends that the Charging Party's request for arbitration was untimely under the contract. However, the Board's deferral in 200 NLRB No. 98 was based on the assumption that Respondent was willing to take the dispute through the grievance procedure and ultimately to arbitration if necessary.[3] Ac-

2. For the reasons stated in their dissenting opinions in *Collyer Insulated Wire,* 192 NLRB 837, and subsequent cases, Members Fanning and Jenkins would not, in any event, have deferred to arbitration but would have decided the case on the merits. (See Member Fanning's dissent in 200 NLRB No. 98.)

3. See *The Detroit Edison Company,* 206 NLRB No. 116. As part of its untimeliness contention, Respondent argues that when the Respondent ordered the clerical employees to return to work they should have followed that order and filed a grievance even if they believed the Respondent's interpretation of the no-strike clause was erroneous: i.e., "grieve and obey." Respondent contends that a logical extension of *Collyer* dictates that since the Union did not "grieve and obey" the case should not have been deferred to the grievance-arbitration procedure but dismissed without reaching the merits. We find no merit in this contention, which, in our opinion, goes far beyond the principles underlying our deferral policy as set forth in *Collyer.*

Respondent contends that its position with respect to deferral has been the same from the beginning of this proceeding; if so, it certainly was not our understanding of Respondent's position, nor, we might add, that of the Administrative Law Judge, the General Counsel, or the Charging Party.

cordingly, in view of Respondent's refusal to go to arbitration, we will decide the issue on the merits.

2. The merits

The Respondent furnishes water to the residents and business facilities of Gary, Hobart, and the surrounding areas. Its employees are represented by two different locals of the Charging Party (or Union)—the so-called men's, or p & m, unit by Local 12584 and the so-called women's, or clerical, unit by Local 14321. The clerical unit, with which we are concerned herein, was certified by the Board on September 1, 1968. On April 1, 1969, after a strike which lasted from March 21 to April 1, 1969, the clerical unit and Respondent entered into a collective-bargaining agreement for the period April 1, 1969, to December 31, 1971. During that strike, 70 of the 97 p & m unit employees honored the clerical unit's picket line. Both units returned to work on April 1, 1969. Although the Respondent prior to April 1, 1969, by letters to the p & m unit and the individual members of the unit, had warned of possible action against the member of the unit, citing the no-strike provision of the contract, no action was taken against the employee-members who engaged in the sympathy strike. In fact, the same no-strike provision[4] (the interpretation of which is in issue

4. That no-strike, no-lockout provision is included in the grievance provision of the contract and reads in pertinent part as follows:

ARTICLE V

Grievances

It is expressly understood and agreed that the services to be and being performed by the employees covered by this agreement pertain to and are essential to the operation of a public utility and to the welfare of the public dependent thereon, and in consideration thereof, and of the agreement and conditions herein by and between the Company and the Union mutually agree that during the term of this agreement there shall be no lockouts by the Company and there shall be no strike, stoppages of work or any other form of interference

herein) of the p & m unit's contract was included in the clerical units contract of April 1, 1969.

On June 1, 1971, after its June 18, 1968, to May 31, 1971, contract expired, the p & m unit engaged in an economic strike, the validity of which is not in question. The clerical employees (33 of 34) chose to honor the p & m unit's picket line. On June 3,[5] the Respondent, by letters to the clerical local's officers and the individual clerical unit employees, indicated it considered the sympathy strike a violation of the no-strike clause, directed all clerical employees to report to work by June 7, and warned of possible termination for failure to do so.

On June 9, during negotiations with the p & m unit for a new contract, in addition to an economic proposal, Respondent submitted for signature by the Charging Party and *both* locals a memorandum of agreement which stated in part:

> From and after June 11, 1971, the Union recognizes that in view of the fact that the Employer is a public utility, the no-strike clause affords no protection except the grievance procedure, to employees who fail or refuse to cross picket lines around the Company premises or operations, or operations of customers, whether legal or illegal, or fail or refuse to work for any other reason; and furthermore, the Union agrees that it will not intimidate or punish or fine any member who crosses or desires to cross a picket line around such company or premises when the bargaining unit to which the employee belongs is not subject to strike.

Louis, the Respondent's president, submitted this proposal because "Respondent had been having trouble with one local honoring the other's picket line, that it had the problem now, and expected it again in the future." Louis said he felt the Respondent had to have this agreement to clear the problem up; the Union rejected the proposal.

On June 17, the Respondent, by letter, notified each of the clericals that her employment had been terminated for breach of the no-strike clause. The Union filed a charge with the Board on June 21, 1971, alleging the discharges were violative of the Act. The strike continued with the terminated clericals joining the p & m unit in active picketing.

On July 20, at a negotiating session with the p & m unit, Respondent proposed the following provision:

> As a part of the settlement of the contract negotiations between the Company and District 50, Allied and Technical Workers, and its members, it is agreed that the wording of Article V of the contract between the parties dated [6/18/68] (and of the same wording as incorporated in the new contract now being negotiated) prohibits any and all work stoppages, strikes, slowdowns, or observances of picket lines from and after June ....., 1971. (The parties remain in disagreement as to the proper interpretation of that wording prior to that date.)

The Respondent's counsel, Daugherty, noted again the problem Respondent had, and was having, with one local honoring the other's picket line, and that it had to be cleared up once and for all. The proposal was rejected by the Union.

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with any of the production or other operations of the Company by the Union or its members, and any and all disputes and controversies arising under or in connection with the terms of provisions hereof shall be subject to the grievance procedure hereinafter set forth if the grievance is filed within ninety (90) days of the occurrence.

Thereafter, the provision provides a three-step grievance-arbitration procedure resulting in binding arbitration under the third step.

In addition, the contract provides a catch-all "Effectiveness" provision (art. XVII) which reads in part:

> (2) The Union agrees there shall be no strikes, slowdowns or other interruptions of work by any of its members during the term of the agreement, and both parties agree that any disputes or differences shall be taken up under the Grievance and Arbitration procedures of this agreement.

5. Unless otherwise indicated all dates hereafter are 1971.

On August 18, the Charging Party sent the following telegram to the Respondent:

> In response to and in compliance with President Nixon's request for a stoppage to strikes and lockouts until Nov. 12, 1971, the members of Local 13584 and 14321 of District 50, A. T. W., in this time of responsibility to cooperate with the President for national emergency feel it is their patriotic duty and the welfare of our country; therefore, we will return to work immediately. Suggest meeting at once to work out details.

Respondent, by telegram, on August 19, replied in pertinent part to the clerical unit:

> . . . we are unwilling to engage in any simultaneous or joint discussions with both locals. Each represents a wholly separate and distinct bargaining unit, and the locals are in totally different situations. The operating (p & m) local has been engaged in a legal strike with us. . . . The members of the clerical unit have been engaged in unprotected and illegal activities, have been discharged, and are not entitled to return to work. We are willing to meet with representatives of the operating local to discuss the details of a return to work at your earliest convenience. We will be willing to consider meeting with representatives of the clerical local if we are informed what topics are to be discussed. . . .

Nonetheless, a joint meeting (both locals) was held with Respondent on August 24. Katz, the union attorney, opened the meeting by saying he wanted to work out the details of the clerical unit's returning to work; the Respondent replied that there was nothing to talk about as they were fired. Pilzer, Respondent's vice president, corroborated Katz' testimony. Later in the meeting (the context of the latter discussion is not clear on the record), Mandich, the clerical unit's chief steward, according to her testimony on direct, told Respondent, "We want to go back to work." Pilzer testified Mandich said, "We will go back to work with the men." President Louis testified Mandich said "that she would like to have the clerical workers go back with

the men." On cross-examination, Mandich testified she said, "We will go back to work with the men." The p & m unit returned to work on August 30.

On September 14, the Union filed a grievance on behalf of the clerical unit employees who had been terminated which was signed by all of the terminated clericals, citing the unjust discharges of June 17 and requesting immediate reinstatement. This grievance was denied by President Louis on the grounds that the clerical employees had engaged in unprotected activity and had been discharged.

On October 27, the Respondent wrote the Union as follows:

> This is to inform you that this company terminates its labor agreement with . . . [Local 14321] . . . executed as of [4/1/69], effective . . . [12/31/71], although we believe that the contract has already . . . been terminated by your organization and members by operation of law. As matters now stand, the Company has 30 employees in the bargaining unit which Local 14321 formerly represented of whom only one as far as we know is a member of your organization. . . . It is readily apparent that you no longer represent a majority of the employees now working in the bargaining unit.

On October 29, the Union, pursuant to Section 8(d) of the LMRA, requested Respondent meet with it to bargain over modification in the clericals' contract; on November 10, the Union followed up its October 29 letter to which it had received no reply and again requested bargaining. The Union also asked if the Respondent's October 27 letter meant that it would not bargain with the Union; by letter of November 11, Respondent refused to meet with the Union for the reasons it had set forth in its October 27 letter.

On the merits, the Administrative Law Judge interpreted the grievance procedure of the contract which includes the no-strike provision and found that the clerical unit's sympathy strike was unprotected, that the discharge of the striking clerical unit

employees was therefore lawful, and that as a result the terminated clericals were no longer employees. He dismissed the 8(a)(3) allegations. Since the refusal-to-bargain aspect of the case depends on the validity of the discharges,[6] he likewise dismissed the 8(a)(5) allegations. We do not agree.

It is fundamental that the right to strike is guaranteed by the NLRA.[7] This right is protected by law, whether the strike be for economic reasons, for the purpose of improving working conditions, *or for mutual aid and protection of employees of members of another union.* Thus, the right to engage in a sympathy strike or honor another union's picket line is also protected. However, the right to strike, including the right to engage in sympathy strikes or to refuse to cross another union's picket line, may be waived by appropriate provisions in a collective-bargaining agreement.[8]

While statutory rights may be waived, however, the Board and the courts have repeatedly emphasized that such waivers will not be readily inferred, and there must be a clear and unmistakable

6. The Charging Party did not claim it represented the terminated clericals' replacements. In fact it was stipulated that since August 15 very few of the clericals employed by Respondent have been members of the Union.

7. *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221; *N.L.R.B.* v. *Southern Greyhound Lines, Division of Greyhound Lines, Inc.*, 426 F. 2d 1299 (C.A. 5); *N.L.R.B.* v. *Difco Laboratories, Inc.*, 427 F. 2d 170 (C.A. 6); *N.L.R.B.* v. *Peter Cailler Kohler Swiss Chocolates Company, Inc.*, 130 F. 2d 503 (C.A. 2). See also Sec. 13 of the Act itself which states:

> Nothing in this subchapter, except as specifically provided for herein, shall be construed as either to interfere with or impede or diminish in any way the right to strike, or to effect limitations or qualifications on that right.

8. *Mastro Plastic Corp. and French American Reeds Manufacturing Company* v. *N.L.R.B.*, 350 U.S. 270; *N.L.R.B.* v. *Rockaway News Supply Company, Inc.*, 345 U.S. 71. In *Rockaway News*, the Supreme Court indicated that the Act does not preclude a collective-bargaining provision which permits employees to refuse to cross a picket line of another union, nor does it prohibit the parties from agreeing on a provision which prohibits employees from crossing another union's picket line.

showing that waiver occurred.[9] And the principle that the waiver of statutory rights must be clear and unequivocal applies to the right to strike, including the right to engage in a sympathy strike or to honor the picket line of another union.[10] As the Supreme Court in *Mastro Plastics, supra* at 283, stated in a slightly different context.

> To adopt petitioners' all-inclusive interpretation of the clause is quite a different matter. That interpretation would eliminate, for the whole year, the employees' right to srike. . . . Whatever may be said of the legality of such a waiver *when explicitly stated*, there is no adequate basis for implying its existence without a more compelling expression of it than appears in . . . this contract. [Emphasis supplied.].

With the foregoing in mind we turn to a consideration of the no-strike clause in this case. The General Counsel and Charging Party contend that the waiver of the right to strike is only as extensive as the scope of the grievance and arbitration procedure of the contract in question. They argue that when the subject of the dispute is not cognizable under the grievance-arbitration procedure the *quid pro quo* for the no-strike clause is no longer present and the no-strike clause does not apply. We agree. The Board[11] and the courts,[12] including the Supreme Court, have indicated no-strike provisions will not be enforced where the subject of the dispute is not covered by the grievance-

9. *The Timken Roller Bearing Co.* v. *N.L.R.B.*, 325 F. 2d 746 (C.A. 6), *cert denied* 376 U.S. 971; *Rockwell-Standard Corporation, Transmission and Axle Division, Forge Division*, 166 NLRB 124, enf'd. 410 F. 2d 953 (C.A. 6); *Beacon Piece Dyeing and Finishing Co., Inc.*, 121 NLRB 953; *The Fafnir Bearing Company*, 146 NLRB 1582.

10. *Montana-Dakota Utilities Co.*, 189 NLRB 879 (Member Kennedy dissenting), enforcement denied 455 F. 2d 1088 (C.A. 8); *Kellogg Company*, 189 NLRB 948 (Member Kennedy dissenting), enf'd. 457 F. 2d 519 (C.A. 6); *Hoffman Beverage Company*, 163 NLRB 981.

11. See *Montana-Dakota* and *Kellogg, supra.*

12. See the Sixth Circuit decision in *Kellogg, supra.*

arbitration procedure. The Supreme Court has spoken to the issue primarily in suits under Section 301 of the Act. In *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U. S. 95, 105, the Court said that "a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement." However, it added that such a no-strike agreement is not to be implied "beyond the area which has been agreed will be exclusively covered by compulsory arbitration." Likewise, in *Boys Market, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235, also a Section 301 injunction suit, Justice Brennan, for the majority, in discussing when a strike should be enjoined by a district court, stated that a strike would be enjoined (unprotected) only if "over a grievance which both parties are contractually bound to arbitrate." And in the Supreme Court's most recent pronouncement on the scope of an arbitration provision, again in a Section 301 context (*Gateway Coal Co.* v. *United Mineworkers of America, et al.*, 410 U. S. 953), the Court stated, "No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so."[13]

The Administrative Law Judge found the instant case distinguishable from *Montana-Dakota* and *Kellog* because in those cases the application of the no-strike clause was specifically limited to disputes covered by the grievance procedure,[14] whereas here the no-strike language is not so limited or made dependent

13. While the Court found the strike in *Gateway* unprotected it did so on the basis of the very broad arbitration clause included in the contract which governed disputes "as to the meaning and application of the provisions of this agreement," disputes "about matters not specifically mentioned in this agreement," and "any local trouble of any kind aris[ing] at the mine."

14. In *Montana-Dakota*, the no-strike provision provided that "there shall be no collective cessation of work . . . on account of any controversy respecting the provisions of" the agreement. In *Kellogg*, the no-strike provision prohibited strikes "in connection with disputes arising hereunder."

on the grievance provision. He further, indicated that he could not discern how a contract could be drawn to cover more clearly all employee concerted activity and to forbid strikes and work stoppages.[15]

The Administrative Law Judge further points out that to accept the Charging Party's contention that the clericals could not air their grievances since they were striking because of the p & m unit's activities, a dispute outside the coverage of their contract, would permit a strike despite a comprehensive no-strike provision whenever a dispute related to any point not covered by their contract. This, in our opinion, is precisely where the Administrative Law Judge errs, for the no-strike clause is not comprehensive but limited to disputes arising under the contract. And at least where statutory rights are involved, unless they are specifically waived, the contracting union does have the right to strike in connection with a dispute not subject to grievance-arbitration, for the no-strike clause is only as extensive as the grievance-arbitration procedure.

Nowhere in the contract does the Union specifically waive the right to honor another union's picket line. The waiver, if any, must be implied; however, the waiver of statutory rights is not lightly to be inferred. The strike by the clerical unit was not over a grievance which the parties were contractually bound to arbitrate. Rather, the strike itself precipitated the dispute—the validity under the Union's no-strike obligation of the

15. Nonetheless, the contract is ambiguous and unclear respecting its application to sympathy strikes. It could have been made clear, unambiguous, and comprehensive with the addition of a provision stating that it barred sympathy strikes or the honoring of another union's picket line. In this regard, we note that such clauses are common in collective-bargaining contracts. For example, such "sympathy strike" clauses were included in contracts in both *Montana-Dakota* and *Kellogg* although they were limited in nature. Likewise, the extended no-strike proposals offered by the Respondent on June 9 and July 21, 1971, were specifically intended to clarify the contract so as to bar sympathy strikes or the honoring of another union's picket line. It is thus obvious, contrary to the Administrative Law Judge's conclusion, that the no-strike clause could have been both more clear and comprehensive.

employee-members honoring the p & m unit's picket line. Put differently, the dispute was between the p & m unit and the Respondent and therefore not resolvable under the clerical unit's grievance procedure.

It is our opinion that the no-strike, no lock-out promise was intended to be in effect only when the dispute between the parties is covered by and can be resolved by the grievance machinery. Here the no-strike, no-lockout provisions are not only included in the opening paragraph of the grievance provision but are part of the same sentence which sets up the grievance machinery and limits it to "all disputes and controversies arising under or in connection with the terms . . . hereof." Indeed, it is difficult to imagine a placement of the no-strike provision which would delineate more clearly or emphatically that the no-strike promise does not stand alone but is part of, and only as extensive as the scope of, the grievance machinery.[16] Both times[17] that the no-strike language appears the grievance language immediately follows. It is our opinion that the Union pledged no-strike only over matters which Respondent agreed to arbitrate.

In addition, we believe our finding is buttressed, as in *Kellogg*, by additional evidence which shows that the parties' intent was unclear with respect to what the no-strike provision actually covered.[18] In these circumstances, the fact that Respondent

16. In this connection, we consider this case even stronger than *Montana-Dakota* and *Kellogg* since in those cases the no-strike provisions were included in separate sections of the contracts involved.

17. Subsec. 2 of art. XVIII, the "Effectiveness" provision, in no way alters our opinion, for that article merely refers back to art. V, the grievance procedure; it does nothing to change what is included in that article or the standards adopted therein.

18. In *Rockaway News, supra,* the Supreme Court indicated that, where a no-strike clause is ambiguous, extrinsic evidence may be considered to determine the intent of the parties. And in *The Hearst Corporation, News American Division,* 161 NLRB 1405, a much broader no-strike provision was considered ambiguous and the Board found the consideration of extrinsic evidence appropriate to clarify the intent of the parties. (See discussion in *Kellogg, supra.*)

attempted, without success, to broaden the no-strike clause to cover "sympathy strikes" on both June 9 and July 21 becomes significant.[19] For the Supreme Court in *Rockaway News,* and the Board in *Hearst,* in holding sympathy strikes unprotected, relied on the fact that during contract negotiations the unions involved had sought to include a provision expressly permitting employees to honor picket lines of another union, which proposals were rejected by the respective employers. Based on the rationale that by attempting to obtain such no-strike limitations the unions therein indicated they believed they did not have such picket line rights under the respective no-strike clauses, the Court and Board respectively found the no-strike provisions should be broadly construed. Here we have the situation, as in *Kellogg,* which is the converse of *Rockaway* and *Hearst,* where the Respondent, not once but twice, sought to include a provision removing the employees' right to honor another union's picket line. By such conduct the Respondent demonstrated its uncertainty as to whether it had obtained a waiver of the right to engage in a sympathy strike in the no-strike clause it sought to change. The Union, on the other hand, by rejecting the proposed changes demonstrated its determination not to waive the right to honor another union's picket line.[20]

19. *Kellogg, supra,* is right on point for there the Board relied on the fact that the employer had attempted after the discharges to obtain an agreement to modify the no-strike provision to specifically ban the right to honor the picket line of another union as evidence that the employer, itself, viewed the no-strike prohibition as a narrow ban on strike activity.

20. The Administrative Law Judge rejected the General Counsel's and Charging Party's contention that *Rockaway* and *Hearst* supported the clerical unit's position. Instead, he found that those cases placed the Charging Party in an even weaker position because the Charging Party here did not propose a clause exempting sympathy strikes. The Administrative Law Judge misses the point. The General Counsel and Charging Party were arguing that the *Rockaway* rationale applied to Respondent's attempt to modify the no-strike clause. Unless it specifically waives it, the Charging Party has the right to honor picket lines. It is the Respondent which must obtain contractual language to limit such right in clear and unmistakable terms.

The Board has held in cases involving sympathy strikes, although primarily when the activity was engaged in at the premises of another employer, that although the refusal to cross the picket line of another union is protected this right must be balanced against the business interest of the employer, and that it is only when the employer's business interest to replace employees is such as clearly to outweigh the employees' protected right that an invasion of the statutory right is justified (*Redwing Carriers, Inc.*, 137 NLRB 1545; *Overnite Transportation Co.*, 154 NLRB 1271). The termination of employees is justified where the employer "acted only to preserve efficient operation of his business, and terminated the . . . employees only so it could *immediately or within a short period thereafter replace them* . . ." (*Redwing Carriers, supra* at 1547.) (Emphasis supplied.) Respondent has not met the *Redwing* test. It is clear that the terminations were not to preserve Respondent's efficient operations but were punitive in nature. Respondent's president testified the employees were discharged for breach of the no-strike clause; their termination letters were to the same effect. No one contends that the employees were replaced on June 17, 1971, the date of termination. In fact, 2 months after the discharges, fewer than 6 of the 34 discharged employees had been replaced. Respondent neither seriously argued nor proved by way of evidence that the terminations were necessary so that replacements could be obtained.

We therefore find that the Union had not waived the right of the clerical unit to observe the picket line of another union, that the action of the terminated clerical employees was not in violation of the applicable no-strike clause, but rather was protected concerted activity, and that Respondent's action in discharging these employees was violative of Section 8(a)(1) and (3) of the Act.

The Administrative Law Judge, as a contingency finding, found the clerical employee's offer to return to work was conditioned on the clerical unit's returning with the men's unit. In

so finding, he ignored most of the relevant evidence on this point and relied only on the testimony of the clerical unit's chief steward, Mandich. We do not agree with his finding. After the clericals were terminated on June 17, they were unfair labor practice strikers and no offer to return was necessary.[21] It was up to Respondent, which had terminated the employees, to request that they return to work.

Moreover, the clerical unit, in our opinion, made an unconditional offer to return. First such an offer was made on August 18 by telegram. Then, the union attorney opened the August 24 meeting by indicating he wanted to work out the details of the girls' returning to work, to which Respondent replied that there was nothing to talk about as they were fired. The Board does not require parties to engage in futile acts.[22] It was only later in the August 24 meeting that Mandich allegedly said "she would like to have the clerical workers go back to work with the men." The Administrative Law Judge relied on this testimony elicited on cross-examination to find the offer conditional although the record does not show what the parties were discussing at that stage of the meeting or in what context the statement was made.[23] Finally, the Union in its September 14 grievance, which was signed by all the clericals, not only protested the discharges but requested immediate reinstatement. In our opinion, the clerical unit's request was unqualified, but even if the so-called qualification existed it was met on August 30 when the p & m unit returned to work. We therefore find that the unlawfully terminated clericals were entitled to reinstatement as of August 30, 1971, when the strike ended and the p & m unit returned to work.

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21. See *Montana-Dakota, supra; Kellogg Company, supra; Southern Greyhound Lines, Division of Greyhound Lines, Inc.*, 169 NLRB 627, *enf'd* F. 2d 1299 (C.A. 5).

22. *Id.*

23. The Administrative Law Judge acknowledged, in discussing the alleged statement testified to by President Louis, that Louis did not attempt to detail the discussion or Mandrich's part in it.

The Administrative Law Judge found the refusal-to-bargain allegation depends on the validity of the discharges. Having dismissed the 8(a)(3) allegations, he therefore dismissed the 8(a)(5) allegations.[24] Since, contrary to the Administrative Law Judge, we have found the discharges violative of Section 8(a)(1) and (3) of the Act, it follows that the terminated clericals remained employees within the meaning of Section 2(3) of the Act and the Union's majority status continued. Respondent by letter of November 11 refused the Union's request to meet and bargain over modifications in the clerical unit's contract. It therefore refused to bargain with the Union in violation of Section 8(a)(5) of the Act, and we so find.

The Remedy

We have found, contrary to the Administrative Law Judge, that Respondent engaged in certain unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by discharging Belita Askew, Mary K. Boby, Rosan Bolint, Alan Butkus, Margaret Clifford, Allen Cozad, James DeSmith, Janice Fugate, Joyce Goszewski, Judith Harper, Michele Huerter, Suzanne Joy, Geraldine King, Shirley Lewis, Anice Little, Arlene Mandich, Myrtle Murphy, Sharon Mullinix, Beverly Neyhart, Addie Nunn, Kay O'Brien, Deborah Richardson, Edward Ryczaj, Barbara Schawilje, Marsha Shear, Barbara Sherman, Barbara Smith, Judith Stanik, Barbara Steele, Constance Taylor, Bettye Turner, Paula Wilson, Helen Wineinger, and Linda Sue Winston for engaging in protected activities. In our opinion, it is necessary to effectuate the purposes of the Act that Respondent be ordered to cease and desist from engaging in such unfair labor practices and to reinstate these employees to their former jobs or, if those jobs no longer exist, to substantially equivalent posi-

24. Respondent admitted that the Union was the certified bargaining representative and that, prior to June 17, it represented a majority of the clerical unit employees. By stipulation, the parties in essence agreed that the refusal-to-bargain aspect of the case depends on the validity of the discharges.

tions, with backpay. The strike having terminated on August 29, 1971, and Respondent having failed to offer the discriminatees reinstatement, we shall order Respondent to make these employees whole for their loss of earnings by payment to each of them a sum which they normally would have earned on and after August 30, 1971, the day the p & m unit returned to work, to the date Respondent offers them reinstatement, less their net earnings for that period. See *Southern Greyhound Lines, Division of Greyhound Lines, Inc.*, 169 NLRB 627; *Kellogg Company*, 189 NLRB 948. Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest added thereto as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

In addition, having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by refusing to bargain with International Union of District 50, Allied and Technical Workers of the United States and Canada, and its designated agents as the exclusive representative of its employees in the so-called clerical unit represented by Local 14321 of the International, we will order that the Respondent cease and desist from engaging in such unfair labor practices and, upon request, bargain collectively with the Union and its designated agents concerning wages, rates of pay, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

Conclusions of Law

1. Gary-Hobart Water Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of District 50, Allied and Technical Workers of the United States and Canada, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since September 5, 1958, the Union has represented a majority of the employees of Respondent in the following appropriate unit:

> All office and clerical employees, including record clerks and engineering clerks, engineering estimators and draftsmen, but excluding all production and maintenance employees, office janitress, confidential employees, temporary employees, professional employees, guards, and supervisors as defined in the Act.

4. By discharging the clerical unit employees listed above in the section entitled "The Remedy" for engaging in protected concerted activity Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act and discriminated in regard to hire, tenure, and other conditions of employment in order to discourage membership in the Union in violation of Section 8(a)(1) and (3) of the Act.

5. By terminating its agreement with the Union and refusing since October 27, 1971, to bargain with the Union as exclusive representative of the employees in the above-described appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Gary-Hobart Water Corporation, Gary, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act

and discriminating in regard to hire, tenure, and other conditions of employment in order to discourage union membership by discharging employees because they engaged in protected concerted activities.

(b) Refusing to bargain collectively with the Union and its designated agents as the exclusive representative of its clerical unit employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(c) In any other manner interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer to the employees listed in The Remedy section of this Decision immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay which they may have incurred by reason of Respondent's discrimination against them in the manner described above in The Remedy.

(b) Upon request, meet and bargain with the above-named labor organization and its designated agents as exclusive representative of all its employees in the aforesaid appropriate unit with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment and embody in a signed agreement any understanding reached.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Gary, Indiana, copies of the attached notice marked "Appendix."[25] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. May 21, 1974.

JOHN H. FANNING, *Member*
HOWARD JENKINS, JR., *Member*
JOHN A. PENELLO *Member*
National Labor Relations Board

(SEAL)

CHAIRMAN MILLER AND MEMBER KENNEDY, concurring in part and dissenting in part:

We agree that in view of Respondent's refusal to go to arbitration that this case should be decided on the merits.

The basic issue on the merits is whether the no-strike clause in the collective-bargaining agreement covering the clerical employees is, as the Administrative Law Judge found, a clear and unambiguous prohibition against all strikes during the contract term or whether it is sufficiently ambiguous, as our colleagues in

25. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the majority find, so as to require resort to extrinsic evidence to determine its intent. We believe the Administrative Law Judge was correct in finding the clause to be clear and unambiguous.

The relevant provisions are set out in footnote 4 of the majority opinion herein. It will be noted that in two places a no-strike pledge appears. In the first, the pledge is that ". . . there shall be no strike, stoppages of work or any other form of interference with any of the production or other operations of the Company by the Union or its members. . . ." In the second, the pledge is that "there shall be no strikes, slowdowns or other interruptions of work by any of its members during the term of the agreement. . . ."

In our view, all of the cases cited by the majority in reaching a contrary conclusion are, as the Administrative Law Judge found, inapposite. As he correctly pointed out, the contract clauses in *Montana-Dakota Utilities Co.*, 189 NLRB 879, and *Kellogg Company*, 189 NLRB 948, differed from the contract clause here in that in those cases the no-strike clause was limited to strikes over disputes arising out of contractual grievances.

The majority reaches out for other cases in which the contracts were even less like the one here. Thus in both the *Lucas Flour* and *Gateway Coal* cases cited in the majority opinion there were no no-strike provisions at all, and the issue was whether one should be inferred by virtue of a broad grievance and arbitration provision. *Boys Market, Inc.*, also referred to by the majority, of course did not concern itself with the issue here at all since the court there was speaking to the issue of the appropriateness of injunctive relief and the proper application of the Norris-LaGuardia Act to suits for injunctions against breach of no-strike agreements.

The Hearst Corporation, News American Division, 161 NLRB 1405, is equally off point, since there too the two contract clauses in issue were both specifically limited in their application, and prohibited strikes only as to disputes which were in the course of being resolved under the grievance and arbitration provisions of the applicable grievance procedure.

The comment of the Administrative Law Judge, as he reviewed some of the above cases which were cited to him by Respondent, seems very appropriate:

> As much, or little, can be said of other cases cited: different cases, different provisions, different conclusions.

Unlike the majority, we are unable to find any basis for construing the plain words of this agreement pledging no strike or other interference with production and no interruptions of work during the term of the agreement to be in any way limited to specific kinds of strikes, stoppages, or interruptions—i.e., strikes or interruptions of work relating solely to disputes arising under the contract.

The sympathy strike of the clerical employees here was in our view in breach of the plain terms of their labor agreement and therefore constituted unprotected activity. We would affirm in its entirety the decision of the Administrative Law Judge and adopt his recommended Order dismissing the complaint.

Dated, Washington, D. C. May 21, 1974

EDWARD B. MILLER, *Chairman*
RALPH E. KENNEDY, *Member*
National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act by discharging or otherwise discriminating against them because of their protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by the Act.

WE WILL offer Belita Askew, Mary K. Boby, Rosan Bolint, Alan B. Butkus, Margaret Clifford, Allen Cozad, James De-Smith, Janice Fugate, Joyce Goszewski, Judith Harper, Michele Huerter, Suzanne Joy, Geraldine King, Shirley Lewis, Anice Little, Arlene Mandich, Myrtle Murphy, Sharon Mullinix, Beverly Neyhart, Addie Nunn, Kay O'Brien, Deborah Richardson, Edward Ryczaj, Barbara Schawilje, Marsha Shear, Barbara Sherman, Barbara Smith, Judith Stanik, Barbara Steele, Constance Taylor, Bettye Turner, Paula Wilson, Helen Wineinger, and Linda Sue Winston immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered by reason of their unlawful discharge.

WE WILL, upon request, bargain with the International Union of District 50, Allied and Technical Workers of the United States and Canada, as the exclusive representative of our employees in the appropriate unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All office and clerical employees including record clerks and engineering clerks, engineering estimators and draftsmen, but excluding all production and maintenance employees, office janitors, confidential employees, professional employees, guards, and supervisors as defined in the Act.

GARY-HOBART WATER CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

APPENDIX D

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

DECISION AND ORDER

On June 16, 1972, Administrative Law Judge[1] Lloyd Buchanan issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs and the Respondent filed an answering brief.

Pursuant to the provision of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order only to the extent consistent herewith.

The complaint alleges and the General Counsel contends that Respondent violated Section 8(a)(3) of the Act by discharging 34 employees on June 17, 1971,[2] because they engaged in a protected sympathy strike, and by refusing to reinstate them when openings have occurred after they made an unconditional offer to return to work on August 18, and that Respondent violated Section 8(a)(5) by terminating its collective-bargaining agreement with the Union on October 27 and refusing thereafter to bargain with the Union.

1. The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

2. Unless otherwise indicated all dates are 1971.

Respondent's employees are represented in two units by locals of the Charging Union. Production and maintenance employees (sometimes referred to as the men's unit) are represented by Local 13584. Office or clerical employees (the so-called women's unit), with whom we are concerned herein, are represented by Local 14321. The clerical local was certified on September 5, 1968. During the period in question the clerical unit was covered by a collective-bargaining agreement effective from April 1, 1969, through December 31, 1971. The contract of the men's unit expired May 31, 1971, and that unit struck on June 1, 1971. On that date, the clerical unit began a sympathy strike by refusing to cross the men's picket line. On June 17, each of the striking clericals was informed by letter that her employment had been terminated for breach of the no-strike provision of the clerical unit's contract. On August 18, the clerical local, by telegram, offered to return to work immediately. On August 19, the Respondent replied that the clericals had engaged in unprotected activity and were not entitled to return to work. On August 30, the men's unit returned to work. Grievances were filed by the terminated striking clericals on September 14, citing the unjust discharge and requesting reinstatement; no further action was taken with respect to the grievances. On October 27, the Respondent notified the clerical local that although it believed the local's contract with Respondent had been terminated by operation of law in view of the local's massive breach of the no-strike clause, it was terminating the contract as of December 31, 1971, the contract's termination date. The Respondent noted further that the Union no longer represented a majority in the clerical unit. Thereafter, Respondent refused to meet to negotiate modifications of the contract.

The Administrative Law Judge found that whether the clerical unit's sympathy strike was protected or unprotected depends on how the non-strike provision of the contract is to be construed. Under his interpretation of the contract, he found that the sympathy strike was unprotected, that the discharges

on June 17 were therefore lawful, and that thereafter the sympathy strikers were no longer employees. He found that the refusal-to-bargain aspect of the case depended on the validity of the discharges,[3] or that the alleged 8(a)(5) violation was derivative of the 8(a)(3). Having dismissed the 8(a)(3) allegations, he dismissed the 8(a)(5) allegation.

In its answer to the complaint, at the hearing and in its brief to the Administrative Law Judge, the Respondent contended that the alleged violations involved a dispute (the scope of the no-strike provision) arising under the collective-bargaining contract between the parties and that such a dispute is subject to the grievance and arbitration provision of the contract. On the other hand, the General Counsel and Charging Party, while contending that the Administrative Law Judge's interpretation of the no-strike provision is erroneous, further contend that the Board should construe it and not defer to arbitration. In his Decision the Administrative Law Judge discussed the deferral issue raised by the Respondent; while his reasons against deferral to arbitration are ambiguous, as we read his comments it appears that he, in effect, decided to defer on the issue of whether the Board should defer to arbitration.[4]

3. The Union did not claim that it represented the terminated clericals' replacements. In fact, it was stipulated that since August 15, very few of the clericals employed by the Respondent have been members of the Union.

4. The Administrative Law Judge at least implies this case may not be an appropriate one for arbitration because under the contract the parties must consent to arbitration. The record does not support that implication. The contract is quite clear in this regard. It states in part: "If the adjustment of the grievance cannot be had . . . the specific grievance shall be submitted to arbitration. . . . (3) ARBITRATION: The Union and the Company, each on its own behalf shall appoint an arbitrator and such two arbitrators shall appoint a third arbitrator. . . ." Specific provision is then made for the appointment of a third arbitrator by the Federal Mediation and Conciliation Service in the event that the Union and Company arbitrators cannot agree on a third arbitrator (cf. *Tulsa-Whisenhunt Funeral Homes, Inc.*, 195 NLRB No. 20, where the arbitration provision could be invoked only by agreement of the parties).

The Administrative Law Judge found, and we agree, that the threshold issue here is whether the clerical unit's sympathy strike was protected activity in light of the no-strike clause included in the collective-bargaining agreement between the parties. The resolution of that issue (whether the no-strike clause prohibited the sympathy strike) turns on the meaning and application of the no-strike clause. It is our judgment that when, as here, the alleged unfair labor practices are so intimately intertwined with the interpretation of the parties' contract, it would best effectuate the policies of the Act to remit the parties to the procedures they have devised for determining the meaning of their agreement.

Under all the circumstances, we therefore conclude that this is an appropriate case for deferral to the machinery agreed upon by the parties for resolution of disputes arising under their contract.[5] If those procedures fail to resolve the issue, our Order permits any party to move for further consideration. Accordingly we shall dismiss the complaint but retain jurisdiction of this proceeding for purposes of entertaining an appropriate post-decree motion.

Remedy

Without prejudice to any party and without deciding the merits of the controversy, we shall order that the complaint herein be dismissed, but we shall retain jurisdiction for the following limited purpose to eliminate the risk of prejudice to any party. Specifically, jurisdiction of this proceeding will be retained for entertaining an appropriate and timely motion for further consideration upon a proper showing that (a) the dispute has not, with reasonable promptness after the issuance of this de-

5. See *Collyer Insulated Wire*, 192 NLRB No. 150. See also *National Radio Company Inc.*, 198 NLRB No. 1, and *Appalachian Power Company*, 198 NLRB No. 7, where the Board (Members Fanning and Jenkins dissenting) held the *Collyer* deferral rationale applicable to alleged 8(a)(3) discharges which essentially involved disputes concerning the meaning of relevant collective-bargaining agreement provisions.

cision, either been resolved by amicable settlement in the grievance procedure or submitted to arbitration, or (b) the grievance or arbitration procedures have reached a result which is repugnant to the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed provided, however, that:

> Jurisdiction of this proceeding is retained for the limited purposes indicated in that portion of our Decision and Order herein entitled "Remedy."

Dated, Washington, D. C. Nov. 30, 1972.

RALPH E. KENNEDY, *Member*
JOHN A. PENELLO, *Member*
(SEAL) National Labor Relations Board

MEMBER FANNING dissenting:

For reasons set forth by Member Jenkins and me in our dissents in *Collyer Insulated Wire*, 192 NLRB No. 150, and more recently in *National Radio Company, Inc.*, 198 NLRB No. 1, and *Appalachian Power Company*, 198 NLRB No. 7, where the Board majority extended its *Collyer* doctrine to encompass alleged violations of Section 8(a)(3), the Board should not abdicate its authority to an arbitrator. Therefore, I would proceed to the merits of the case.

As a secondary consideration I see something incongruous in a situation where the Respondent, in effect, repudiates its agreement with the Union because of the Union's alleged breach of the agreement and then invokes the grievance-arbitration procedures of that agreement in urging that the Board defers its jurisdictions.

Dated Washington, D. C. Nov. 30, 1972.

NATIONAL LABOR RELATIONS BOARDS
John H. Fanning, *Member*

APPENDIX E

TRIAL EXAMINER'S DECISION

Buchanan, Trial Examiner: Unlike a recent case[1] in which I excluded proffered testimony because the proffer showed that it was irrelevant and could not affect the issues although the Board, describing the rejected testimony as "insufficient to establish the inappropriateness of [its own newly] certified unit" (this, of course, being the reason for the exclusion at the trial after counsel had explained the reason for the proffer), nevertheless declared that it should have been received and that the exclusion was erroneous but somehow nonprejudical, various allegations and defenses and the evidence pro and con with respect to them are here relevant, and dependent on the validity of the primary defense. That evidence has been received.

With disposition of the case on the primary issue, there is no need in this Decision to swell the time spent at the trial by further consideration and detailed recital of the evidence on those other issues which need not now be reached and which the Board may "not reach or pass upon."

But habit and my interest in the proceeding as it developed, impelled me to evaluate the evidence as it was received and thereafter, and to make tentative findings pending the conclusion of the trial. Should reviewing authority desire additional reference to various points raised, further hearing will be unnecessary; on remand I shall be quite prepared to submit analysis, which I now deem (and the Board may agree) unnecessary beyond that offered below. *Pace* the Broad, "It is not meet that every nice offense should bear his comment."

The complaint herein (issued January 4, 1972; charges filed June 21 and November 12, 1971), as amended, alleges that

1. *Penn Building Maintenance Corp.*, 195 NLRB No. 29.

the Company has violated Section 8(a)(3) of the National Labor Relations Act, as amended, 73 Stat. 519, by discharging 34 employees on June 17, 1971, because they engaged in a protected sympathy strike, and by refusing to reinstate them when openings have occurred although they made an unconditional offer to return to work on August 18, 1971; Section 8(a)(5) of the Act by terminating its collective-bargaining agreement with the Union on October 27, 1971, and bargain with the Union; and Section 8(a)(1) of the Act by each of the above acts.

The answer, as amended, denies the allegations of violation and further alleges that the strikers violated a no-strike clause in the collective-bargaining agreement, that the strikers participated in mass and violent picketing, that the Union rejected the Company's offer to arbitrate under the contract, that no unconditional offer was made to return to work, and that the strikers have been replaced or their jobs eliminated; further that the Union would be involved in a disqualifying conflict of interest if it sought to represent the strikers' replacements, that the Company on October 27 gave notice of termination of the contract as of December 31, 1971, and that the breach of the no-strike provision terminated the contract before October 27.

The case was tried before me at Gary, Indiana, on February 15 through 17, 1971, inclusive. Counsel were heard in oral argument and briefs, excellent within the limitations of the respective positions, have been filed by the General Counsel, the Company, and the Union, the time to do so having been extended. Upon the entire record in the case from my observation of the witnesses, I make the following:

Findings of Fact (With Reasons Therefor) and Conclusions of Law

I. The Company's Business and Labor Organization Involved

The facts concerning the Company's status as an Indiana corporation, the nature and extent of its business as a public

utility under permit from the Public Service Commission of the State of Indiana, and its engagement in commerce within the meaning of the Act are admitted; I find and conclude accordingly. I also find and conclude that, as admitted, the Union is a labor organization within the meaning of the Act.

II. The Unfair Labor Practices

A. *Outline of Events*

The Company's employees are represented in two units by respective locals affiliated with the Charging Union. Production and maintenance employees, in what is sometimes referred to as the men's unit, are represented by Local 13584. Our direct concern is with the office and clerical employees or so-called women's unit (although it includes four male clericals), which has been represented by Local 14321. On September 5, 1968, the Charging Union was certified by the Board as the exclusive collective-bargaining representative for the clericals in a unit described as follows:

> All office and clerical employees, including record clerks and engineering clerks, engineering estimators, and draftsmen employed by the employer at its Gary, Portage and Hobart, Indiana locations, but excluding all production and maintenance employees, office janitress, confidential employees, temporary employees, professional employees, guards and supervisors as defined in the Act.

Effective April 1 (January 1 is elsewhere declared to be the effective date) a collective-bargaining agreement covering the clericals through December 31, 1971, was entered into between the Company and the Charging Union on behalf of 14321. The women had been on strike between March 20 and April 1, 1969, and approximately 70 of some 97 men in the production unit had honored their picket lines. (We were also told that 43 remained on the job.) It is noted that on March 21, 1969, the Company in a letter to the president of the men's local cited the no-strike provision in their contract and warned

of possible action against the locals and the employees for violation of the agreement by the refusal to cross the picket line; 5 days later the Company sent a letter, similar to the extent pertinent, to members of 13584.

The contract with 13584 having expired on May 31, 1971, the operating employees began an economic strike on June 1 and remained out until August 30. On June 1 the clericals began a sympathy strike,[2] refusing to cross the men's picket line. It is claimed that the clericals' became an unfair labor practice strike with their discharge on June 17.

On June 3 the Company sent to Mandich a letter similar to that of 2 years before addressed to Local 13584; and on the same day a letter to each clerical, citing a breach of the no-strike clause, directing that they report for work on June 7 and, quoting from the contract that their services "are essential to the operation of a public utility and to the welfare of the public," warning of termination and possible damage action.

On June 9, during negotiations with the men's local only, the Company submitted for proposed signature by the Charging Union and both locals a memorandum of agreement which provided, *inter alia,* that the Union and the locals would not take action against any member who crossed a picket line set up by a unit other than that to which the employee belonged. The Charging Union and the locals refused to sign. It was later brought out that the Union had asked the Company to draft a document covering the Company's position on the items mentioned in the proffered memorandum of agreement.

2. In the face of the early admission that this was a sympathy strike, and the facts which regardless of the label attached so indicate, Mandich, chief steward for Local 14321, disingenuously maintained that this was not a strike when clericals refused to go to work on June 1 and thereafter but became one with receipt of discharge letters which the Company sent on June 17. She pointed out that the clericals carried no picket signs before June 18.

On June 17 the Company notified each of the clericals that her employment had been terminated for breach of the no-strike clause of the contract.

Under article V, Grievances, the contract provides as follows:

> It is expressly understood and agreed that the services to be and being performed by the employees covered by this agreement pertain to and are essential to the operation of a public utility and to the welfare of the public dependent thereon, and in consideration thereof, and of the agreement and conditions herein by and between the Company and the Union be kept and performed, the Company and the Union mutually agree that during the term of this agreement there shall be no lockouts by the Company and there shall be no strike, stoppages of work or any other form of interference with any of the production or other operations of the Company by the Union or its members, and any and all disputes and controversies arising under or in connection with the terms of provisions hereof shall be subject to the grievance procedure hereinafter set forth if the grievance is filed within ninety (90) days of the occurrence. . . .

Article XVIII, Effectiveness, reads as follows:

> (2) The Union agrees that there shall be no strikes, slowdowns or other interruption of work by any of its members during the term of this agreement, and the Company agrees that there shall be no lockout during the term of this agreement, and both parties agree that any disputes or differences shall be taken up under the Grievance and Arbitration procedures of this agreement. . . .

It was stipulated that article V appears in the contract between the Company and the men's unit, effective June 18, 1968; and that, while that no-strike provision is essentially the same as appears in contracts between the Company and the men's unit during the last 20 years, these latter contracts have not included a provision similar to that quoted above from article XVIII.

Thereafter, the strike and the sympathy strike continuing, the Company, at a negotiating session with Local 13584 on July 20, submitted to the Union the following proposal:

> As a part of the settlement of the contract negotiations between the Company and District 50, Allied and Technical Workers, and its members, it is agreed that the wording of Article V of the contract between the parties dated June 18, 1968 (and of the same wording as incorporated in the new contract now being negotiated) prohibits any and all work stoppages, strikes, slowdowns, or observances of picket lines from and after June ....., 1971. (The parties remain in disagreement as to the proper interpretation of that wording prior to that date.)

It was testified that counsel for the Company maintained and insisted that this paragraph had to be part of the package submitted to the union membership for approval; and that the union representatives were firmly opposed to it.

The meeting lasted until about 4 o'clock the next morning, and later that day the Company submitted a five-page memorandum of tentative agreement without mention or reference to the suggestion of the day before. The testimony that at the conclusion of the meeting early on the morning of March 21 the Company was not insisting on inclusion of the paragraph which it had submitted at that meeting is supported by the fact that the lengthy and detailed proposal now submitted did not include the paragraph offered just a few hours earlier.

On July 22 in a letter to Moser, president of Local 13584 who was also acting on behalf of Local 14321, the Company invoked arbitration under the grievance procedure of the contract with the clericals.

On August 18 both locals sent the following telegram to the Company:

> In Response To And In Compliance With President Nixon's Request For A Stoppage To Strikes And Lockouts Until Nov. 12, 1971, The Members Of Local 13584 And 14321 Of District 50, A.T.W., In This Time Of National Emergency Feel It Is Their Patriotic Duty And Responsibility To Cooperate With The President For The Welfare Of Our Country; Therefore, We Will Return To Work Immediately. Suggest Meeting At Once To Work Out Details.

The Company replied as follows by telegram on August 19:

> Mr. John Moser, President
> Local, 13584, District 50
> Allied & Technical Workers
> 1122 West Fifth Avenue
> Gary, Indiana 46402
> Mrs. Arlene Mandich, Chief Steward
> Local 14321, District 50
> Allied & Technical Workers
> 1122 West Fifth Avenue
> Gary, Indiana 46402
>
> In Your Wire To Us Of August 18, You Stated That Your Members "Will Return To Work" And Suggested An Immediate Meeting To "Work Out The Details." Subsequent Telephone Conversations With Mr. Moser And Others Have Made It Clear, As Is Implied In Your Wire, That You Are Demanding A Joint Meeting of Both Locals With Us. Confirming Our Telephone Conversations, We Are Unwilling To Engage In Any Simultaneous Or Joint Discussions With Both Locals. Each Represents A Wholly Separate And Distinct Bargaining Unit, And The Locals Are In Totally Different Situations. The Operating Local Has Been Engaged In A Legal Strike In A Dispute With Us Over Conventional Items Of Collective Bargaining—Such As Wages, Working Conditions, Etc. On The Other Hand, The Members Of The Clerical Unit Have Been Engaged In Unprotected And Illegal Activities, Have Been Discharged, And Are Not Entitled To Return To Work. We Are Willing To Meet With Representatives Of The Operating Local To Discuss The Details Of A Return To Work At Your Earliest Convenience. We Will Be Willing To Consider Meeting With Representatives Of the Clerical Local If We Are Informed What Topics Are To Be Discussed. In View Of The Injunction Issued By U.S. District Judge Barrington Parker. We Are Not Certain That The Participation Of Steel Workers Representatives At Such Meetings, Rather Than District 50 Representatives, Would Be Appropriate. However, We Will Not Object To Such Participation At This Time.

On September 14 grievances were filed in general terms on behalf of the striking clericals, in which they cited the allegedly unjust discharges on June 17 and requested that they be immediately reinstated. No further action was taken with respect to these grievances.

Declaring its belief that the collective-bargaining agreement with the clericals had already been terminated, the Company sent the following letter to the Union on October 27, allegedly to avoid automatic renewal of the contract (and placing the discharges on June 18):

> International Union of District 50
> Allied & Technical Workers of America
> 11 East Adams Street—Room 902
> Chicago, Illinois 60603
>
> Att: Mr. Joseph Defalco
> Director—Region 43
>
> Gentlemen:
>
> This is to inform you that this company terminates its labor agreement with your Union (and with its Local 14321) executed as of April 1, 1969, effective on the date therein provided, December 31, 1971, although we believe that the contract has already been terminated by your organization and members by operation of law.
>
> As you know, the members of Local 14321 engaged in a massive breach of the no-strike clauses of the contract commencing June 1, and continuing until on or about August 30, 1971. This necessitated the discharge of 33 of them on June 18, 1971, and their ultimate replacement by other employees.
>
> Your organization filed charges with the National Labor Relations Board alleging that the discharge of these employees constituted an unfair labor practice. However, as you know, the Regional Director refused to issue a complaint finding: "the evidence shows that the employees represented by Local 14321 were engaged in unprotected activities".
>
> As matters now stand, the Company has 30 employees in the bargaining unit which Local 14321 formerly represented, of whom only one is as far as we know a member of your organization. (We understand that you have a dispute with one other employee as to whether she made a timely resignation from the Union. In any event, if she is a member, it is obvious she is an unwilling one.)
>
> It is readily apparent that you no longer represent a majority of the employees now working in the bargaining unit.

Under date of October 29, the Union requested that Company meet with it to negotiate modifications in the clericals' contract. By reply on November 11, the Company rejected this request, citing its letter of October 27. The Union had on November 10 acknowledged receipt of the Company's letter of October 27 and had referred to its own letter of October 29.

B. *The Alleged Violation of Section 8(a)(3)*

Much of the testimony received could be called "contingency testimony": It would require consideration only if other testimony were not determinative. Thus, if the defense be sustained that the clericals' strike or refusal to work violated the contract between Local 14321 and the Company, and that they were not protected as either unfair labor practice or economic strikers, it would be unnecessary to determine whether there were violative discharges before replacements were hired. Otherwise we would then detail *seriatim* whether the strikers unconditionally offered to return to work; whether they were in fact replaced or their jobs abolished before any condition that the production and maintenance strikers return was met; and whether picket line activity justified refusal or failure to rehire any. Somewhere here the so-called *Collyer*[3] defense of deferral to arbitration procedure under the contract might also be weighed.

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3. *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB No. 150.

The primary defense cites the no-strike provisions of the contract of April 1, 1969. After its warning of June 3, the Company in the discharge letters of June 17 cited article V of the contract. The no-strike provisions are here clearly stated.

This brings us to cases on this point and the arguments made. A provision against cessation of work or interference therewith is lawful and the Act "clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross picket line if they so agree. And nothing in the Act prevents their agreeing upon contrary provisions if they consider them appropriate to the particular kind of business involved. An employee's breach of such an agreement may be made grounds for his discharge without violating Sec. 7 of the Act."[4] With the discharge lawful in *Rockaway News,* cited by both sides, we have an *a fortiori* situation in the instant case where, unlike *Rockaway News,* members of the Union are expressly cited. If distinction be claimed in the fact that in *Rockaway* the Union sought a clause permitting it to honor the picket line, but was turned down, it cannot be sensibly found that the employee's rights are greater and the employer's less where the Union did not even seek such permission.

In *Montana-Dakota Utilities,*[5] cited by the General Counsel, aside from the fact that the action there taken was "not solely for the purpose of preserving the efficient operation of Respondent's business," the employer "made no attempt to replace" them "while the picketing was in progress." The no-strike clause in that case provided that "there shall be no collective cessation of work . . . on account of any controversy respecting the provisions of" the agreement. In the instant case, the no-strike bar is not so limited, the reference to the provisions of the agreement being in connection with grievance

4. *N.L.R.B.* v. *Rockaway News Supply Company, Inc.,* 345 U.S. 71.

5. *Montana-Dakota Utilities Co.,* 189 NLRB No. 111, enforcement denied 455 F. 2d 1088, C.A. 8 (March 15, 1972).

procedure. This is so despite the argument now made of waiver "only to the extent of disputes arising under the contract." Unlike *Granite City Steel,*[6] the no-strike clause here was not limited by or made dependent upon the grievance procedure; it was coordinate with and not conditioned upon such procedure.

Similarly, the decision in *Kellogg*[7] makes it clear that, unlike our case, the contract there barred "only strikes over a grievable dispute" and "arising [t]hereunder," and in that connection applied "only to the 'Union,' " not its members.

That the decision in *Hoffman Beverage*[8] is not here applicable is so obvious as to require no comment. As much, or little, can be said of other cases cited: Different cases, different provisions, different conclusions. If, as argued with reference to a *Hearst* case,[9] bargaining history indicated a "failure of the union to obtain the picket line clause it had proposed during negotiations," the absence of a different proposal no more serves to modify what is carefully set forth in the agreement reached, inclusive and from the Company's point of view well drafted. True, the rejection of a proposal indicates the parties' intent; so presumably does a provision which on its face is unambiguous.

In the instant case, limitation with respect to matters subject to the grievance procedure is placed on the arbitrators only. The General Counsel correctly points out that *Lincoln Mills*[10] recognizes a no-strike provision as a *quid pro quo* for the grievance procedure. But to argue that the clericals could not air their grievances since they were striking because of the men's activities which were outside the clericals' contract, is akin to the patricide's plea for leniency due an orphan.

6. *Granite City Steel Company,* 87 *NLRB* 894, 895.

7. *Kellogg Company,* 189 NLRB No. 123, enf'd. F. 2d (C.A. 6, March 22, 1972).

8. *Hoffman Beverage Company,* 163 NLRB 981.

9. *The Hearst Corporation, News American Division,* 161 NLRB 1405, 1416.

10. *Textile Workers Union of America, AFL—CIO* v. *Lincoln Mills of Alabama,* 353 U.S. 448.

Such an argument would permit a strike despite a comprehensive no-strike provision whenever a dispute can be indicated with reference to any point not covered by the contract. We cannot so readily deracinate the product of years of negotiations and agreement and the work of experienced negotiators and draftsmen.

It is nowhere suggested how a contract could be drawn to cover more clearly all employee concerted activities and to forbid strikes and work stoppages; nor are cases cited with clearer, more comprehensive, and admittedly sufficient no-strike clauses—unless it be claimed, in the face of *Rockaway News, supra,* that there cannot be any such.

Certainly as counsel for the Union argues, the economic dispute between the men's unit and the Company was not cognizable under the clericals' contract and was not subject to grievance. But the clericals' claim of a right to strike because of the men's dispute and picket line was, whatever its merits, cognizable as a grievance which the Company, if belatedly, offered to expedite. In any event, the no-strike provisions applied.

As noted above, when the General Counsel urges that reference here is to disputes arising under the contract, that reference is to the grievance procedure, not to the no-strike provision. If an arbitration clause is the *quid pro quo* for a no-strike clause, the latter is not to be vitiated by a specious argument which would sanction removal of controversies from the scope of a no-strike provision as broad as that in the contract before us.

The General Counsel argues for waiver or an interpretation of the agreement, or both, on the basis of past practice, when the men struck in sympathy with the women in 1969. The fact that the Company at that time wrote two letters threatening discharge but took no action, the strike ending a few days later, does not establish a pattern or precedent for the situation when,

after, a longer period and virtually complete cessation, operations now had to be resumed.

Neither the failure to discharge the men or sympathy strike in 1969 nor the provisions of the clericals' contract constitute that waiver of the no-strike provision which must be spelled out in clear and unequivocal terms.[11] As pointed out, the clericals' contract was signed and the sympathy strikers returned to work within a few days after they were warned in 1969, the work continuing; now the clericals had been out for 2½ weeks and the prospect was that the men would continue their strike for a long time, as they did until August 30, and the clericals theirs in sympathy while their own work accumulated. There was no waiver or acquired "right to honor [the] picket line," now claimed by the Union; if the clericals opined or "concluded" otherwise, it was in the face of prompt notice by the Company. If on one hand it be claimed that no employee was disciplined in 1969, it is clear on the other that the Company's warnings at that time were not questioned. If they rely on the Company's limited action in 1969, the clericals cannot ignore the failure at that time to question the Company's position (and the apparent acceptance of it) *vis-a-vis* those who had refused to cross a picket line. Aside from the difference between the 1969 and the instant situations, noted above, we cannot properly rely on failure to do more than issue warnings and ignore the failure to question those warnings.

Reference has already been made to the testimony concerning the Company's proposals of June 9 and July 20. The General Counsel argues that these indicate that the Company itself evidently considered the provision to be ambiguous and that it therefore called for further agreement concerning it. That proposal no more indicates an admission by the Company concerning its understanding of the meaning of the no-strike provision, than it does a superabundantly cautious attempt to

11. *The Timken Roller Bearing Company,* 138 NLRB 15, 16.

avoid repetition of the situation. Manifestly, not every contingency can be foreseen. If an attempt be made to meet an interpretation which is not accepted and to avoid the effect of such an interpretation, that attempt does not itself affect the meaning and effect of the language previously used.[12] The question remains, how is the contract language to be construed here and what are the rights of the parties?[13] I find and conclude that the clericals' strike was unprotected, that the discharges on June 17 were lawful, and that the clerical strikers were thereafter no longer employees.

Although with this finding it becomes unnecessary to proceed to the other allegations and defenses, I am also led by a regard for the efforts of counsel to state, without detailing all of the record testimony, what my findings would be on the basis of the evidence pro and con on those matters.

With detailed examination with respect to the Company's list of clericals and their replacements and the abolition of their jobs, the issue is raised of the Company's right to discharge before replacement, granted the public service status of the business. Here we must recognize that the strike was in violation of the contract and the further fact of need to preserve efficient operation of this important utility. From the record it appears that sufficient help was available during the brief production and maintenance strike in 1969; not so when 34 of 35 clericals struck in 1971. That the public interest and public service regulations required the Company to continue to provide water is clear. While such interest and regulations

12. See *Kellogg Company* v. *N.L.R.B.*, F. 2d (C.A. 6, March 22, 1972).

13. If an employer's subsequent compliance with an award supporting a union's position does not excuse an earlier violation by the union (*Local 423, Laborers' Mansfield Flooring Co., Inc., d/b/a Columbus Cement Floors*) 195 NLRB No. 35, the attempt here to obtain agreement on the position indicated in the contract and asserted by the Company does not alter the fact that the clericals and their local had violated the contract.

did not carry over directly to billing and other commercial and administrative operations, the Company could not for long neglect such operations; it delayed for 17 or 18 days, a reasonable period.

In this connection reference may be made to *Redwing Carriers*[14] and to *Montana-Dakota,*[15] the latter particularly with reference to any attempt to replace and the distinction between preserving efficient operation and disciplining. Insofar as need for employees is concerned, during the 1½-week strike of clericals in 1969, when production and maintenance employees stayed out in sympathy, the Company operated with the aid of approximately 30 or 40 percent of the latter, who did cross the picket line.

Touching briefly on the contingency defenses, we come to the issue of unconditional offer by the clericals to return. It is frequently difficult to prove the facts; and difficult to make credibility findings. Testimony may be colored or the evidence presented only partially. As an example of the latter, Katz, attorney for the Union, testified that at a meeting on August 24 between representatives of the Company and of the clericals' local (this after the Company's letter of August 19), he declared that they wanted to work out details of the girls going back to work; that the Company's reply was that there was nothing to talk about since all had been fired; and that after further discussion Chief Steward Mandich stated that all of the girls were ready to go back to work. Asked whether there was "any mention made of the men's local," Katz replied in the negative. He was not asked whether mention was made of the production and maintenance employees returning to work. He offered no outright denial that Mandich had connected the clericals' return with that of the men.

14. *Redwing Carriers, Inc., and Rockana Carriers, Inc.,* 137 NLRB 1545.

15. *Supra.*

On this latter point we received testimony pro and con. But most significant in this connection was Mandich's own admission that the clericals "were offering to go back to work with the men." Two months after the discharges, and the men still on strike, this offer to return was conditional despite Mandich's insistence that she imposed no conditions.[16]

Mandich is intelligent and forceful. Her admission is meaningful, and I do not credit her denial on rebuttal. Whatever was otherwise testified to by witnesses whose memory might be deemed slight or whose bias great, we find support for the admission in Mandich's subsequent testimony that the clericals were "honoring the picket line set up by Local 13584": That was and continued to be, as she told us, their policy. Accepting the telegram's statement of the motive which prompted it 2 months after the discharges, it was on its face a joint request and referred to a joint return. The clericals' return was intertwined with and conditioned on a proposal to "work out details" with respect to return by members of both locals. The women struck in sympathy with the men. It does not appear that such sympathy, their purpose, or their procedure changed. We recall that the members of Local 13584 did not end their strike until August 30.

Beyond all of this, we have documentary evidence which points to the offer of return as conditional, this indicated in the concatenation between the two locals as indicated in the telegram of August 18. Louis, the company president, did not attempt to detail the discussion or even Mandich's part in it. But his uncertain summary or conclusionary statement confirmed what we had already heard: As he recalled, "she said that she would like to have the clerical workers go back with the men." This was more directly testified to by other company witnesses, who confirmed what Mandich herself admitted.

16. Her earlier testimony was that she declared at this meeting that the clericals felt that they "had a right to go back too" "if the men were going back to work."

With decision on the issues of unlawful discharge, unfair labor practice strike, entitlement to reinstatement, and offers to return, it becomes unnecessary to pass on the question whether the clericals' jobs were permanently filled or abolished. We need not trace the list of clerical personnel and their replacements and the detailed examination and cross-examination concerning these to determine whether any of the former employees' jobs remained unfilled and available. Some jobs had been eliminated, others were filled by permanent or temporary replacements.

At the trial the Company showed a film to support its defense of mass and violent picketing. There was no such identification as would justify the refusals to reinstate and, as I stated *ex directo* on the record the incidents depicted did not appear to approach, in seriousness or vigor, incidents described in the cases and which the Board has found to be no more than examples of acceptable "animal exuberance" or "normal picket line activity." (It should suffice to refer parenthetically to the fact that still pictures were also taken at various times.)

With respect to the defense that the issues should have been arbitrated, 2 years ago, well before *Collyer*,[17] I analyzed a deferral problem in which arbitration would not settle all of the issues, including violation of Section 8(a)(3), before the Board; and despite such delays in the past and to date, I submit that delay in Board processing is not built in: The rights of litigants can be determined fully and expeditiously. *Collyer*, since issued, and decisions in other cases pending would now be determinative; but we need not pass upon that question here.

The arbitration procedure under the contract, with the requirement that such party name an arbitrator and thus consent and proceed to arbitration, and the deferral by the Board in *Collyer*, present a procedural problem which now remains unsolved. We can defer to a more appropriate time consideration of the questions which could be raised in this respect.

17. ***Collyer Insulated Wire, supra.***

Whatever else may be said in this connection, the clericals not having requested arbitration, the Company's arbitration offer on July 22, whatever its effect, was not "negated" by its refusal to bargain when it subsequently declared the contract terminated.

C. *The Alleged Violation of Section 8(a)(5)*

This is not a case where protected economic strikers are replaced, the status of the replacements depending on reinstatement of the strikers and both groups being deemed employees eligible to vote on the issue of representation. The Union has not claimed that it represented[18] the replacements or that it represented a majority. Upon their lawful discharge on June 17, the erstwhile strikers were no longer employees.

Both sides agreed[19] that the refusal to bargain aspect depends on the issue of the validity of the discharges, or that the 8(a)(5) finding is a derivative of the 8(a)(3). The latter having been dismissed, it follows that the allegations of violation of Section 8(a)(5) must likewise be dismissed.

D. *The Alleged Violation of Section 8(a)(1)*

All of the interference alleged is admittedly derivative and dependent upon the findings with respect to the other allegations. The allegations of violation of Section 8(a)(1) are dismissed.

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18. It was stipulated that since August 15, very few if any clericals employed by the Company have been members of Local 13584. We need not concern ourselves with the defense that the Union would be involved in a disqualifying conflict of interest—more correctly whether it would be representing employees who had conflicting interests—and the law concerning the extent of its right to do so.

19. Because the issue is now raised in the Union's brief and stipulated matters are sometimes overlooked on review, with a finding that they cannot be found, I repeat that the transcript includes a stipulation and subsequent admission in this connection.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[20]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C.

LLOYD BUCHANAN
Trial Examiner

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20. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.